(8)

No. 97-1625

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

CALIFORNIA DENTAL ASSOCIATION,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* and BRIEF OF THE CONSUMER DENTAL CHOICE PROJECT OF THE NATIONAL INSTITUTE FOR SCIENCE, LAW AND PUBLIC POLICY, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Consumer Dental Choice Project of the National Institute for Science, Law and Public Policy, Inc. sought permission of both parties for leave to file this brief *amicus curiae*. The United States per letter of Solicitor General Seth

P. Waxman, consented. The California Dental Association, however, refused permission, and despite a specific request, refused to state its grounds for doing so.

Therefore, the Consumer Dental Choice Project moves that this Honorable Court accept this *amicus curiae* brief supporting the Federal Trade Commission as to the first issue, that the FTC has jurisdiction over professional associations.

First, petitioner has not consented to a single *amicus* on the other side. Even though the United States has graciously assented to several *amici* opposing its position, petitioner has taken the opposite "hardball" approach.

Second, there are no other non-governmental *amici* in support of the FTC. It is true that 27 state Attorneys General have filed an excellent brief in support of the United States, but certainly a brief from the private sector can add a dimension that a governmental body does not. With several private sector *amici* favoring the petitioner, the undersigned suggests the Court could benefit hearing from a private sector *amicus* on the government's side.

Third, the undersigned Consumer Dental Choice Project believes it has added unique arguments in support of the FTC, not otherwise raised by the Solicitor General or the state Attorneys General, arguments that could assist this Court in making a highly significant ruling. For example, this brief suggests that petitioner is asking the Court to depart from the spirit of it landmark *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), decision, which demolished, for antitrust purposes, a "learned profession" exception to the antitrust laws - and wisely so. And the undersigned also argues that the first issue of the petitioner has already been

decided through numerous cases, *sub silentio*, in favor of the FTC, and that there really is no conflict in the Circuits.

Finally, the Consumer Dental Choice Project will point out the ongoing anticompetitive practices of petitioner's affiliate American Dental Association and sister state dental associations in trying to destroy competition from dentists who use dental filling materials other than mercury, such as by promoting sham litigation by state dental boards. The ADA has held patents on dental amalgams, and its members appear to fear the growing ground swell from scientists and governments alike that mercury amalgams may be harmful. Indeed, it is no surprise that petitioner refused consent to a brief by the Consumer Dental Choice Project, because the latter has been so intensely critical of alleged anticompetitive practices in the area of mercury-based vs. mercury-free fillings. The Project has boldly suggested that advancing the profits of ADA and CDA members and maintaining its economic dominance as an association (not public health or consumer protection) constitute the rationale for the ADA and its state affiliates' anticompetitive practices against mercury-free dentists.

For the above reasons *amicus* asks that this motion be granted.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE CONSUMER DENTAL CHOICE PROJECT OF THE NATIONAL INSTITUTE FOR SCIENCE, LAW AND PUBLIC POLICY, INC., IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The Consumers for Dental Choice Project is a coalition sponsored by the National Institute for Science, Law and Public Policy, Inc. a Washington, D.C. based public interest organization that for more than twenty years has sought ways to ensure that governmental policy reflects emerging science.

The Project is challenging the American Dental Association's policy opposing mercury-free dentistry. Amalgams, by far the most common tooth filling material, contain about 50 percent by weight of the toxin mercury. The governments of Canada and Great Britain have cautioned their dentists against using it, especially for children, pregnant women, and people with kidney problems, and scientific studies increasingly suggest the harm of the metal and that its vapors could adversely affect large segments of the citizenry. A growing minority of dentists in the United States now refuse to use mercury fillings.

The ADA long held patents on amalgams (Patent #4,018,600 and Patent #4,078,921, now expired). Simultaneous with the holding of patents, but without referencing the organization's self interest, the ADA adopted an advisory opinion to its Code of Professional Conduct which seeks to prevent mercury-free dentists from discussing their practice with their patients or the public:

> Based on available scientific data, the ADA has determined that the removal of amalgam restorations from the non-allergic patient for the alleged purpose of removing toxic substances from the body, when such treatment is performed solely at the recommendation or suggestion of the dentist, is improper and unethical.

Advisory Opinion to ADA's Code of Professional Conduct, Section 5.A.

The ADA has subsequently acted in close coordination with state dental boards -- whose membership is overwhelmingly made up of ADA members -- to harass dentists who are mercury-free. Such dentists have been forced to go to great expense and public embarrassment to defend practices that are legal under state law but arguably contrary to ADA policies. It is important to note that the ADA is seeking to impose such policies on non-members, and despite the fact that in all but one state (Iowa), no state statute or regulation requires or prefers amalgam use, Indeed, many state boards have adopted policies declaring neutrality on the issue of what filling material a consumer may use.

Consumers for Dental Choice Project, created in 1996, is a coalition composed of mercury amalgam victims, scientists, dentists, physicians, and interested citizens, along with several national organizations: Dental Amalgam Mercury Victims, Inc. (DAMS), a New Mexico nonprofit corporation based in Virginia Beach, Virginia, whose members or family members have suffered from chronic diseases emanating from mercury amalgams; Citizens for Health, based in Boulder, Colorado, a national organization with over 100 chapters whose goal is health freedom, including freedom of choice in filling materials; the International Academy of Oral Medicine and Toxicology, based in Orlando, Florida, a scientific-based organization of dentists, physicians, and scientists who have concluded that mercury fillings are adverse to public health; and the Holistic Dentists Association, based in Spokane, Washington, a national organization of dentists who focus on the health of the patient over the cosmetic appearance of the teeth.

SUMMARY OF ARGUMENT[1]

Petitioner would seek to turn the antitrust clock back to re-creating a "learned professions" exception to the antitrust laws. Two decades ago, this Court turned aside such an approach to antitrust enforcement. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975). Now, petitioner asks the Court to re-create that special exemption from antitrust enforcement for professionals when their restraints of trade or deceptive practices occur in the context of their "professional societies," i.e. trade associations of for-profit business entities who hold a particular kind of license. While a professional association, like any other trade association – or any other business entity, for that matter – may include more lofty-sounding goals in its mission statement, no economist – and probably no trade association executive either – would quarrel with the concept that the association exists first and foremost to advance the economic goals ("profits") of its membership.

To exempt professional associations would carve a huge segment of the economy away from FTC jurisdiction, the same concern the Court expressed in *Goldfarb*. A likely definition of a "professional" is one licensed as one. A state is likely to license two dozen or more professions, giving huge numbers of economic actors a freer hand to violate the antitrust laws. The state Attorneys General concede that they are much less likely to apprehend such violators without maintaining their strong partnership with the FTC.

That the FTC's jurisdiction extends to professional associations has already been accepted by the courts – there

[1] In this brief, *amicus* addresses only the first issue in the writ, whether the FTC has jurisdiction over nonprofit professional associations.

is no conflict in the Circuits. The FTC may not reach associations whose members are primarily nonprofit companies, a plain reading of the statute, which allows jurisdiction only where either the entity or its members are engaged in business for profit. *Community Blood Bank* v. *FTC*, 405 F.2d 1011 (8th Cir. 1969). The Ninth Circuit, in the case below, fully accepts *Community Blood Bank* as good law, holding that the FTC's jurisdiction – again, based on a plain reading of the statute – applies to associations composed of members engaged in business for profit. It notes that dental associations are much like medical groups in that regard. *American Medical Association* v. *F.T.C.*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982). So *Community Blood Bank* (8th Circuit), *AMA* (2nd Circuit), and *CDA* (9th Circuit) are all in accord with each other.

FTC jurisdiction over professional trade associations appears to have also been accepted *sub silentio* by this Court. *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447 (1986); *FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990). With such a litany of cases, Congress has had plenary opportunities to shield professional associations from FTC jurisdiction – and, of course, it could still do so. But it has not.

The American Dental Association and its state chapters are aggressively battling individual dentists and rival dental associations who compete with their members. The most intense part of this economic strife is over whether fillings should contain the toxin mercury. The ADA, who has long held patents on amalgams (since expired), proclaims them safe, and encourages sham litigation by state dental boards against dentists who hold the opposing view. Although the health departments of other nations, such as Canada and

Great Britain, have warned that amalgam use may be unsafe, the ADA – perhaps spurred forward to protect their members from liability – continues to proclaim amalgams safe and support prosecuting those who do not. Because the ADA's membership includes half of all dentists, a dominant market share, and because its state chapters may have even a much higher percentage (petitioner CDA's membership includes 75 percent of California dentists), it is by far the more powerful in any economic competition. To absolve the ADA from being subject to FTC scrutiny would be unfair to consumers who deserve choices in their public health and dental services.

The ADA also uses its seal of approval on a large number of products. If petitioner prevails, and if the ADA then engages in deceptive advertising practices in marketing its seal – and it has a record of standing by its sponsors when the FDA has challenged the product on public health grounds – no federal agency would exist to protect American consumers.

ARGUMENT

I.
The "Learned Profession" Immunity to the Antitrust Laws Was Buried Decades Ago and Should Not Be Resurrected.

Ignoring the last quarter century of antitrust case law, petitioner would have this Court re-carve a special role for professional associations. Indeed, petitioner presents itself before the Court much as the Virginia State Bar did in *Goldfarb v. Virginia State Bar*, 421 U.S. 778 (1975). As Chief Justice Burger stated, in his unanimous opinion for the Court, the bar argued "enhancing profit is not the goal of

professional activities; [rather] the goal is to provide services necessary to the community." *Id.* at 786. The California Dental Association echoes the same theme when it tries to classify its work as community-oriented.

For the Virginia State Bar in 1975, the argument "loses some of its force when used to support the fee control activities involved here." *Id.* For petitioner CDA in this case, its usage of advertising rules to reduce competition among its members likewise "loses the force" of its argument about acting like an eleemosynary corporation.

Lawyers and dentists compete in the marketplace. They enjoy no immunity. The major purpose of the trade associations formed by professions is the same as the purpose of trade associations formed by butchers, bakers, and candlestick makers, a fact recognized by Adam Smith back in 1776: to make profits. Smith, Wealth of Nations. Smith, the apostle of modern capitalism, stated that competitors most commonly get together to collude, not to improve themselves.

Professions encompass a huge segment of today's marketplace. Dentistry, being descended from Nineteenth Century barbers, is not a traditional learned profession. It is a "profession" because state laws so defined it. In fact, states define dozens of other "professions" the same way. West Virginia, for example, licenses at least 27 professions: accountants, architects, landscape architects, barbers, beauticians, chiropractors, contractors, dental hygienists, dentists, foresters, funeral directors, hearing aid dealers, lawyers, licensed practical nurses, registered professional nurses, nursing home administrators, occupational therapists, optometrists, osteopathic physicians, physical therapists, physicians, physician assistants, podiatrists, professional

engineers, psychologists, surveyors, and veterinarians. Holmes, West Virginia Blue Book (1996).

If dental associations become exempt, so will the associations representing all of those professions. As the state Attorneys General point out in their brief, to remove the FTC from this arena will severely hurt overall antitrust enforcement, and will remove the associations totally from federal consumer protection oversight as well.

II.

No Conflict in the Circuits Exists; FTC Jurisdiction over Professional Trade Associations with For-Profit Members Has Long Been Accepted by Congress, the Courts, and Even the American Dental Association.

No conflict in the circuits exists. The language of the FTC Act is simple, clear, and consistently decided by the Circuits.

The plain language of the statute makes it clear that professional associations are subject to FTC jurisdiction. Section 4 of the FTC Act, 15 U.S.C. 44, established the FTC's jurisdiction over entities "organized to carry on business for its own profit *or that of its members*." If Congress wanted to limit jurisdiction to for-profit businesses, it would have said so. It did not. It reaches those entities organized to carry on profit for its members. It is hard to find a more accurate and succinct definition of a trade association, including one operating under the guise of a "professional" association, than those very words.

Community Blood Bank v. *FTC*, 405 F.2d 1011 (8th Cir. 1969), held that a trade association consisting overwhelmingly of nonprofit members was not covered by Section 4 of the FTC Act, a ruling plainly called for in the language of the statute. The association could not exist to promote "profits" of members not organized for profit.

American Medical Ass'n v. *FTC*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982), was a straightforward case of a trade association of for-profit members, so jurisdiction by the FTC was found.

The case before this Court, *California Dental Ass'n* v. *FTC*, 128 F.3d 720 (9th Cir. 1997), had essentially the same facts and therefore the same holding. The Ninth Circuit correctly noted that the AMA is an organization much more like the CDA – both of whose membership are profit-seekers – than either is like the Community Blood Banks of Kansas City. Petitioner's Writ for Certiorari at 15a. The Ninth Circuit *agreed* with the Eighth Circuit's *Blood Bank* decision, that truly charitable corporations are exempt from FTC jurisdiction. and stated that the FTC was acting as it did in its prosecution of the AMA, because in both *AMA* and *CDA*, the Commission's concern was "behavior directly affect[ing] the profitability of its members' practices." Id. at 16a.

The Seventh Circuit is operating on the same page. In *FTC* v. *National Commission on Egg Nutrition* 517 F.2d 485, the Court upheld jurisdiction, even noting that efforts to increase egg consumption was pursuing profits of its members. Analogously, the CDA promotes dentists generally, and the ADA promotes mercury amalgams in particular; see Section III, below.

Petitioner and its *amici* are simply incorrect in suggesting that a conflict in the circuits exists. Indeed, *amicus* American Dental Association recognized that it is subject to Section 4 for its numerous business (but not its charitable) activities – and, clearly, putting restrictions on advertising is a business activity. During the Congressional debates in 1977, when the FTC sought to expand its jurisdiction to the nonprofit world generally, the report by Congressman Broyhill indicates concerns by the American Medical Association and American Dental Association about having their *non-business* activities reached by the FTC. Acknowledged throughout was the FTC's jurisdiction over their *business* activities.[2] So no change in law in 1977 meant all sides accepted the status quo: the FTC continued to have jurisdiction over business activities of professional and other trade associations. See H.R. Rep. No. 95-339 (1977).

In antitrust law, this Court has given strong weight to Congressional inaction. *Flood* v. *Kuhn*, 407 U.S. 258 (1972). The baseball incongruity remained because Congress passed over plenary opportunities to change it. Here, Congress is well aware that the FTC frequently investigates and occasionally prosecutes professional associations. Congress could have interceded to change the law, but has not.

In 1998, six decades after court-made immunity was granted baseball, Congress wrote a special law repealing antitrust immunity for player contracts but preserving it in other areas – and graciously named the statute after the late

[2] Likewise, the American College of Alternative Medicine (to which some members of Consumer Dental Choice Project belong, and with which CDCP shares significant views on current medical controversies), at first denied FTC jurisdiction over its activities and filed an amicus brief in this case – but last week accepted Commission jurisdiction by agreeing to a consent order in a case brought against it by the FTC.

Mr. Flood. Congress will, therefore, act to change established antitrust case law if it disagrees. But petitioner has not pointed to a single bill indicating Congressional interest in preventing the FTC from continuing its decades-long pursuit of professional associations engaged in either unfair methods of competition or deceptive acts and practices. 15 U.S.C. 45(a).

Indeed, even this Court appears to have accepted, *sub silentio*, FTC jurisdiction over professional trade associations. In the 1980s and again in the 1990s – after establishing in the 1970s that there is no "learned profession" exception – the Supreme Court upheld Commission findings of antitrust violations by such associations. *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447 (1986); *FTC* v. *Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990).

III.

The American Dental Association and Its Member State Associations (such as Petitioner) Are Aggressive Marketplace Participants Securing Profits for Their Members, Including Taking Major Anticompetitive Steps to Drive Nonmember Dentists out of Business.

The American Dental Association is an economic colossus, with half of American dentists as members and the most comprehensive product endorsement of products of any organization in the nation.[3] The ADA and its member state associations are engaged in major steps both to advance the

[3] In total contrast to the ADA's massive product endorsement campaign, the American Medical Association considers the endorsement of products to be unethical and has a policy against doing it.

profitability of its members – such as the advertising campaign whose impact was effectively unmasked by the Commission – and in driving out of business those dentists who are critical of ADA policies.

A. The ADA Has a Massive Anticompetitive Campaign Against Mercury Free Dentists.

The ADA was founded in the 19th century, besting a rival group of medically trained providers to become the major trade group for dentists. The basis for its creation was the use of mercury-based fillings, known today as amalgams or "silver fillings." They remain by far the most common filling material in the United States. Despite the growing aversion to using mercury in any other use that could come in touch with the human body,[4] the ADA continues to insist that filling materials containing 50 percent mercury is safe. Other nations are less certain, and governments such as Canada, Great Britain, and Sweden are acting to stop its use, especially with vulnerable populations such as children and pregnant women.[5]

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[4] Examples of banning mercury use, except in the teeth, are widespread. Recently, the FDA banned the use of products such as "Mercurachrome," a mercury-based product to treat cuts. Mercury is no longer used to treat syphilis, because oral ingestion is so dangerous. Environmental officials attempt to safeguard against any dumping of the product. California voters have ratified a proposition requiring the posting of notices when mercury is used in dental offices, a move opposed by the ADA.

[5] The Canadian Health Department wrote a letter to all of that nation's dentists urging them to stop giving amalgams to children, pregnant women, people with kidney problems, people with other metals such as braces, and people exposed elsewhere to mercury. The British government, noting a link between miscarriages and the placement of amalgam filings, took steps to stop its use for pregnant women. Sweden is stopping all use of amalgams.

Based on scientific research that directly conflicts with the ADA's assurance of mercury amalgam safety, many American dentists now refuse to use mercury in filling materials. Those who are vocal about it frequently face investigations and even prosecutions by state dental boards, whose membership is substantially ADA and state dental association members. The latter have initiated cases to stop dentists from conveying information to the public that could question the pro-amalgam policies of the dentist majority. Most alarming to the boards, it appears, are those dentists whose message is successful enough that patients in large numbers are now abandoning ADA-members in favor of mercury-free dentists. These latter dentists almost invariably are not ADA members.

The ADA works closely with dental board to promote prosecutions of such dentists, even when it is manifest that the dentist is plainly within his or her First Amendment rights. The ADA supplies "expert" witnesses and even will bring its own attorney to the proceeding. Recently, in both Florida and Maryland, cases against dentists were dismissed after the Attorney General's office advised the Dental Boards that they must comply with the First Amendment. But the ADA remains undeterred.

While telling the public that mercury amalgams are "safe," the ADA does not simultaneously disclose that it has held at least two patents on mercury amalgams: Patent #4,018,600 and Patent #4,078,921. Such a conflict of interest illustrates the ngths the ADA will go to promote the profits of its members – and perhaps protect the latter from civil liability as well where amalgam causes health problems.

B. The ADA Is Such a Powerful Endorser of Dental Products that It Is the Gatekeeper for Who May Effectively Compete.

The ADA endorses all manner of products that could be used in the mouth, receiving compensation for such endorsements. It is able to use the funds from such royalties to attack mercury-free dentists, to lobby, to promote its brand of dentistry, and otherwise advance the economic interests of its members.

The ADA seal of approval is a make-or-break matter for many new products. Endorsement can be the prerequisite for successful marketing of products dealing with the oral cavity.

Once endorsed, the ADA stands behind the product even when a governmental agency warns about its deleterious effect on public health. When the FDA determined that fluoridated toothpaste should no longer be given to children (if a child swallows fluoridated toothpaste, the FDA advises parents to call the nearest poison control center), it required warning on the toothpaste tube and box. It was not surprising that the toothpaste companies objected. But the ADA, faced with choosing to support the FDA in its pursuit of protecting children's health, or stand by its sponsors, chose the latter, issuing a public statement against the FDA.

CONCLUSION

Amicus asks this Court to affirm the Ninth Circuit decision. The California Dental Association, the ADA, and other state associations are major market participants whose programs clearly demonstrate, as was proved in the record below, that they are organized to carry on business for the profit of their members. It would be a major mistake for this Court to change what is already accepted law – expressly in the Circuits, where there is no conflict, and *sub silentio* by this Court, and change what should be left to Congress, who has never shown any desire to do so.

It is to the great credit of this Court that it ended the antitrust "learned profession" exemption a generation ago, meaning professionals are subject to the same rules on competition as the rest of society. The Court should turn a deaf ear to those who wish to give professionals license to restrain trade or engage in deceptive practices under the thin gauze of their trade associations.

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